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EXAMINER

GELLNER, JEFFREY L

ART UNIT

PAPER NUMBER

3643

DATE MAILED: 03/03/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/656,643

Applicant(s)

WILLIAMES, GEOFFREY ALAN

Examiner

Jeffrey L. Gellner

Art Unit

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 05 December 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-6, 13-16 and 19-22 is/are pending in the application.
- 4a) Of the above claim(s) 20 is/are withdrawn from consideration.
- 5) ☒ Claim(s) 16 and 19 is/are allowed.
- 6) ☒ Claim(s) 1-6, 13-15 and 21 is/are rejected.
- 7) ☒ Claim(s) 22 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- ☒ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____
- ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____
- ☐ Notice of Informal Patent Application (PTO-152)
- ☐ Other: _____

DETAILED ACTION

Election/Restrictions

In the response received 19 March 2004 Applicant elected Invention I, Species A - Figs. 1-7. Claim 20 is not considered to be within the ambit of the elected invention - species combination because of the language of "additional spaced apart open top cells outward of said rows of indexing apertures." Claim 20, therefore, is withdrawn from examination.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1, 3, and 4 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1, 7, and 8 of U.S. Patent No. 6,651,384 B1. Although the conflicting claims are not identical, they are not patentably distinct from each other because both sets of claims are drawn to a nursery tray formed from a sheet of polymer material having thicker and thinner zones, spaced apart indexing apertures in the thicker zone, and a plurality of rows of cells and stiffing ribs (portions).

Claim Rejections - 35 USC §103

The following is a quotation of 35 U.S.C. §103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1, 5, and 21 are rejected under 35 U.S.C. §103(a) as being unpatentable over Araki et al. (JP10-248396) in view of Brown (US 1,221,789) in further view of Nicholson (US 5,274,953; document F on Applicant's 1449).

As to Claims 1 and 21, Araki et al. disclose a nursery tray (Figs. 1 and 2) formed from a sheet of polymer material (inherent) having flanges and a plurality of rows spaced apart open top cells (11 of Figs. 1 and 2) located between the flanges, the flanges coplanar with the open top of the cells, the cells adapted to be filled with growing medium for plants (title). Not disclosed is the tray with spaced thicker and thinner defined zones and at least two rows of aligned, spaced apart indexing apertures formed in the thicker zones of the sheet. Brown, however, discloses a container with spaced thicker and thinner defined zones (see Fig. 4), the flanges being the thicker defined zone; Nicholson discloses at least two rows of aligned, spaced apart indexing apertures formed in the thicker zone. It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the tray of Araki et al. by making the tray with thicker zones in the flange as disclosed by Brown so that the tray has "maximum strength, especially at the place or places" where the tray is "subjected to unusual strains" (see Brown at col. 1 lines 17-20) and

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to put at least two aligned, spaced apart indexing apertures in the thicker, flange zone so as to use the tray in an automated, conveyor system.

As to Claim 5, Araki et al. as modified by Brown and Nicholson further disclose peripheral flanges (18 of Fig. 2 of Nicholson) at opposite edges, each with indexing apertures, each flange with a depending stiffening flange (region of flange 18 in Fig. 2 that is below 22 of Nicholson).

Claim 2 is rejected under 35 U.S.C. §103(a) as being unpatentable over Araki et al. (JP10-248396) in view of Brown (US 1,221,789) and Nicholson (US 5,274,953; document F on Applicant's 1449) in further view of Boodley et al. (EP 0254434 A2).

As to claim 2, the limitations of Claim 1 are disclosed as described above. Not disclosed are a plurality of cells located outwardly of indexing apertures. Boodley et al., however, disclose apertures (capable of being indexing apertures) with a plurality of cells located outwardly of the indexing apertures (22 of Figs. 1 and 2). It would have been obvious to one of ordinary skill in the art at the time of the invention to further modify the tray of Araki et al. as modified by Brown and Nicholson by adding apertures capable of being indexing apertures as disclosed by Boodley et al. so as to increase air movement.

Claims 3,5, and 13-15 are rejected under 35 U.S.C. §103(a) as being unpatentable over Araki et al. (JP10-248396) in view of Brown (US 1,221,789) and Nicholson (US 5,274,953; document F on Applicant's 1449) in further view of Kuben (DE 4420189 C1).

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As to Claim 3, the limitations of Claim 1 are disclosed as described above. Not disclosed are stiffing ribs between some of the cells, the stiffening ribs extending laterally relative to the rows of indexing apertures. Kuben, however, discloses stiffening ribs (26 of Fig. 9) between cells, the stiffening ribs extending laterally relative to the rows of indexing apertures (ribs 26 at the left and right ends on tray in Fig. 9 extend laterally). It would have been obvious to one of ordinary skill in the art at the time of the invention to further modify the tray of Araki et al. as modified by Brown and Nicholson by adding stiffening ribs as disclosed by Kuben so as to direct water flow to the plants.

As to Claim 4, Araki et al. as modified by Brown, Nicholson and Kuben further disclose bridging material between cells (region between cells in Figs. 1 and 2 of Nicholson or between cells in Figs. 6, 9, 10 of Kuben), the stiffening ribs comprising upwardly open grooves (32 of Fig. 6 of Kuben) located the bridging material without communicating with the cells.

As to Claim 13, the limitations of Claim 1 are disclosed as described above. Araki et al. as modified by Brown and Nicholson and further disclose bridging material between cells (region between cells in Figs. 1 and 2 of Nicholson). Not disclosed are stiffing ribs between some of the cells, the stiffening ribs extending laterally across the tray. Kuben, however, discloses stiffening ribs (26 of Fig. 9) between cells, the stiffening ribs extending laterally across the tray. It would have been obvious to one of ordinary skill in the art at the time of the invention to further modify the tray of Nicholson as modified by Araki et al. by adding stiffening ribs as disclosed by Kuben so as to direct water flow to the plants and to have the ribs extend laterally from indexing aperture to indexing aperture so as to meet the strength needs of the tray.

As to Claim 14, Araki et al. as modified by Brown, Nicholson and Kuben further disclose open grooves (32 of Fig. 6 of Kuben) located the bridging material without communicating with the cells.

As to claim 15, Araki et al. as modified by Brown, Nicholson and Kuben further disclose laterally extending flanges formed by the thicker zone (18 of Figs. 1 and 2 of Nicholson), the indexing apertures being formed in each laterally extending flange (Figs. 1 and 2 of Nicholson).

Claim 6 is rejected under 35 U.S.C. §103(a) as being unpatentable over Araki et al. (JP10-248396) in view of Brown (US 1,221,789) and Nicholson (US 5,274,953; document F on Applicant's 1449) in further view of Bohlmann (US 5,022,183; document D on Applicant's 1449).

As to Claim 6, the limitations of Claim 1 are disclosed as described above. Not disclosed is the cells vacuum formed in the thinner zone. Bohlmann, however, discloses a tray with cells vacuum formed (col. 2 lines 45-46) which in the sheet of Araki et al. would be the thinner zone. It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the tray of Araki et al. as modified by Brown and Nicholson by making the cells by vacuum forming so as to use an inexpensive and easily used method of production.

Allowable Subject Matter

Claims 16 and 19 are allowed over the art of record.

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Claim 22 is objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Response to Arguments

Applicant's argument to the double patenting rejection filed on 5 December 2005 has been fully considered but they are not persuasive. Applicants' argument is that the "possibility of [patent] extension is not present in this case because the present application is a continuation" (Remarks page 7, 2nd para.). Examiner agrees with the statement by Applicant, however, double patenting is also proper to prevent conflicts in licensing. Here, the instant double patenting rejections is to prevent any conflicts in licensing the instant invention.

Applicant's arguments with respect to the art rejections of claims 1-6, 13-15, and 21 have been considered but are moot in view of the new ground(s) of rejection.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jeffrey L. Gellner whose telephone number is 571.272.6887. The examiner can normally be reached on Monday-Friday, 8:30-4:00, alternate Fridays off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Peter Poon can be reached on 571.272.6891. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

A handwritten signature in black ink, appearing to read 'J. L. Gellner', with a stylized flourish at the end.

Jeffrey L. Gellner
Primary Examiner
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